KAREN CHEONG YUEN YEE

v.

PHUA CHENG CHUEN

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[DIVORCE PETITION NO: S8-33-916-2002]
20 JANUARY 2004

FAMILY LAW: *Divorce - Petition for divorce - Grounds - No specific particulars or evidence to substantiate allegations in petition - Whether merely bare allegations*

FAMILY LAW: *Divorce - Adultery - Alleged respondent not made a co-respondent - No waiver from court obtained - Petitioner continued marital relationship with respondent after alleged adultery - Whether petitioner had condoned respondent's adultery assuming there had been adultery - Whether petitioner had discharged onus of proving ground of adultery*

FAMILY LAW: *Divorce - Cruelty - No medical or police report pertaining to alleged injury or injuries caused by respondent - Whether ground of cruelty made out*

FAMILY LAW: *Children - Custody - Joint custody - Factors influencing court in granting joint custody*

FAMILY LAW: *Divorce - Maintenance - Ordered for petitioner wife for as long as she remained unmarried*

FAMILY LAW: *Children - Maintenance - By respondent husband after divorce*

FAMILY LAW: *Matrimonial property - Division of - Equal division between parties - Equal shares held on trust for children of the marriage*

The petitioner wife petitioned for divorce on the following grounds: (a) adultery; (b) cruelty; (c) drunken and gross misbehaviour by the respondent; and (d) irretrievable breakdown of marriage as a result of the respondent's gross misbehaviour. The respondent husband however denied the allegations and instead averred that the marriage had irretrievably broken down as a result of the petitioner's own misbehaviour. The matrimonial home – a condominium – was purchased in the joint names of the petitioner and respondent. However it was the respondent who acquired, renovated and furnished the condominium at

his own expense. The facts also showed that it was the petitioner who evicted the respondent from the condominium and thereafter denied him access. There were three children of the marriage – a boy aged 12 and two girls respectively aged 9 and 6. The respondent was a good father, husband and provider and also actively involved in the upbringing of the children. Despite an interim access order granting him limited access to the children, the respondent continued to have difficulties in obtaining such access due to the petitioner.

Held (dissolving the marriage and granting the parties joint access to the children):

[1] The petitioner had not furnished any specific particulars or offered any evidence to substantiate her allegations. They were therefore bare allegations. *Bhanmu Sekaramani v. Vagamma* [1991] 3 MLJ 34 (foll). (p 106 e-f)

[2] In the instant case the petitioner had not made the alleged adulteress a co-respondent nor had she obtained leave of the Court to waive such requirements under s. 58(1) of the Law Reform (Marriage and Divorce) Act 1976. Further, the petitioner under cross-examination testified that after the alleged adultery (supposedly committed by the respondent on 29 September 1998), she continued to have a marital relationship with the respondent and continued to have such relationship after they moved into the condominium in December 2000. Counsel for the petitioner also impliedly admitted that there was condonation on the part of the petitioner in the petitioner's written submission in reply. In the instant case, it was clear that the petitioner had condoned the adultery if there was genuinely one. The High Court, after hearing oral evidence of both parties on the ground of adultery, concluded that the petitioner had failed to discharge the onus. (pp 107 d, 109 f & 110 a)

[3] With regard to the ground of cruelty, the petitioner failed to produce any medical report or police report pertaining to the alleged injury or injuries caused by the respondent. She had therefore failed to discharge the onus of proof. Concerning the respondent's drunken behaviour, the petitioner failed to produce any evidence to substantiate the allegations and had again failed to discharge the onus of proof. (p 110 d & g)

[4] In the instant case, a joint custody order was suitable for the following reasons: (a) both parents lived close by to each other; (b) there was no proven violence, harassment and cruelty by the husband on the wife; (c) this was not a case where the wife was chased out from the matrimonial home by the husband; (d) the parties did not sign any document whereby both agreed to be divorced with immediate effect and to go their separate ways. (p 116 b-c)

[5] The High Court also *inter alia* ordered: (a) the respondent to personally pay the petitioner RM1,800 monthly maintenance so long as she remained unmarried; (b) the respondent to maintain the children; (c) the matrimonial home be divided 50:50 between the petitioner and the respondent with each party holding their share on trust for the three children and each party paying their share of the monthly installment repayment; (d) each party to pay their own costs. (pp 116 g & 117 b-d, g)

Case(s) referred to:
Bhamu Sekaramani v. Vagamma [1991] 3 MLJ 34 ***(foll)***
Chan Bee Yen v. Yap Chee Kong [1989] 1 MLJ 370 ***(refd)***
Kah Cheong Chan Kenneth v. Teoh Kheng Yau [1994] 2 SLR ***(refd)***
Koh Teng Lam v. Elise Koh Chen Chee & Anor [1976] 1 MLJ 103 ***(refd)***
Kong Ka Heng v. Ng Mooi Yee & Anor [2001] 2 CLJ 578 HC ***(refd)***
Soo Lina v. Ngu Chu Chiong [1994] 2 MLJ 134 ***(refd)***
Wee Hock Guan v. Chia Chit Neo & Anor [1964] 3 MLJ 217 ***(refd)***

Legislation refrred to:
Divorce & Matrimonial Proceeding Rules 1980, r. 11(1)
Law Reform (Marriage and Divorce) Act 1976, ss. 58(1), 88(4)

Other source(s) referred to:
Debbie Ong, *Parents and Custody Orders – A New Approach,* [1999] SJLS205
Halsbury's Laws of England, vol 13, 4th edn, para 1304

For the petitioner - Patrick Dass (En Visunathan); M/s Patrick Dass & Co
For the respondent - Chew Biman (Yasmeen Shariff); M/s Chew Biman & Co

Reported by Andrew Christopher Simon

JUDGMENT

Faiza Tamby Chik J:

The petitioner wife and the respondent husband were married on 30 September 1990. The respondent was 26 years old and the petitioner was 21 years old. The first child and only son, Aaron was born on 21 December 1991. The second child Regina was born on 24 October 1994. And the youngest child Evonne was born on 24 November 1997. The petitioner at all material time even until today is a music teacher attached to Bentley Music Sdn. Bhd. drawing a monthly salary of RM1,800. The petitioner and the respondent since marriage have stayed together with the respondent's parents at No. 126, Jalan Terasek, Bangsar Baru, Kuala Lumpur up to sometime in October 1996, and then at No. 9, Lorong Chenderai, Taman Lucky, 59100 Kuala Lumpur until 15 December 2000 when the petitioner, respondent and children moved out. The land and house known as No. 9, Lorong Chenderai, Taman Lucky, 59100

Kuala Lumpur (hereinafter referred to as "No. 9") was purchased exclusively from the savings of the respondent's father. The respondent, petitioner and children were invited to reside with the respondent's parents. Sometime in late 1999 or early 2000 the petitioner and respondent's relationship became strained and the petitioner pestered the respondent to move out of the respondent's parent's home to stay at a place exclusively for the respondent's immediate family. On 29 August 2000 the respondent and the petitioner entered into a sale and purchase agreement to purchase No. 18, Jalan 1/70C, Off Mon't Kiara, 50480 Kuala Lumpur for RM532,000 (Q7 in Respondent's Affidavit of Means affirmed on 16 July 2003) (hereinafter referred to as "the Condo"). It is observed that the respondent solely paid for the entire acquisition, renovation and furnishing of the condo. I am of the view that if the respondent is a selfish person and being fully aware that the marriage prior to the acquisition of this condo had become strained, surely he would not have considered buying the condo in joint-name with the petitioner and spending a substantial sum of his own money furnishing it. I think it is the respondent intention of salvaging the marriage that he took the trouble and effort in securing this condo.

The petitioner, the respondent and the children moved into their new home sometime on 15 December 2000. The petitioner and the respondent were quite happy to stay at this new condo with the children. However, such cordial and happy relationship between the petitioner and respondent was short-lived. The respondent was kicked out of his condo sometime in March 2001 (see para. 2(c) of the respondent's affidavit affirmed on 22 May 2000). Subsequent to the respondent's eviction, the petitioner changed the locks to the condo thereby effectively preventing the respondent to have access to his home. The petitioner and respondent's relationship deteriorated after the respondent left the condo and culminated with this divorce petition being filed in this court by the petitioner.

The petitioner has in her divorce petition ("the petition") made the following allegations:

(a) in para. 14 of the petition, the petitioner alleged that the respondent had committed adultery on 29 September 1998 at 11.30pm with one woman named "Carol";

(b) in para. 18 of the petition, the petitioner alleged that she had suffered mental cruelty owing to the behaviour of the respondent and his parents;

(c) in para. 19 of the petition, the petitioner alleged that the respondent used to come home late at night drunk;

(d) in para. 20 of the petition, the petitioner alleged:

(i) that the respondent had caused physical violence on her;

(ii) that the respondent threw, attacked and kicked the petitioner who subsequently suffered grave pain;

(iii) that the petitioner and children suffered shock and had emotional and mental pressure;

(iv) as a result of allegations (i), (ii) and (iii) the petitioner and children left No. 9, Lorong Chenderai, Taman Lucky, 59100 Kuala Lumpur (at para. 23 of the petitioner's petition).

The above allegations briefly falls under the following grounds for divorce namely:

(a) Adultery;

(b) Cruelty (physical and mental);

(c) Drunken behaviour of respondent/gross misbehaviour;

(d) Irretrievably breakdown of as a result of the respondent's gross misbehaviour.

The respondent had in his reply denied those allegations enumerated in grounds (a) to (d) and in fact has averred that the marriage has been irretrievably broken down as a result of the petitioner's own misbehaviour. With regards to grounds (a) to (d) I observe that the petitioner has not even furnish any specific particulars or even offered any evidence to substantiate her allegations. I think these are bare allegations, the fact that the respondent purchased the condo in the joint-name with the petitioner and having spent sums of money for renovation and furnishing and subsequently moving into the condo with the petitioner and the children and continued to live happily with the children for a short spell until the respondent was kicked out of the condo strongly imply that there was condonation on the part of the petitioner. In *Bhamu Sekaramani v. Vagamma* [1991] 3 MLJ 34 Lim Beng Choon J held:

> (2) Under paragraphs (a) and (b) of s. 54(1) of the Act the commission of adultery by the Respondent of gross misbehaviour on the part of the Respondent is not per se sufficient ground for divorce simply because the Respondent may be able to show that the Petitioner has condoned the adultery or misbehaviour and the court must consider the conduct and circumstances of the case to see whether it is justifiable to grant a decree.

Here, the petitioner and the respondent allege different facts to establish that their marriage has broken down irretrievably. The respondent denied all the facts alleged by the petitioner. Therefore, if the petitioner wanted the court to make a decree for the dissolution of their marriage based on those facts present in her petition, it was for her to satisfy the court, at the trial, that the circumstances made it just and reasonable to make such a decree having regard to her alleged facts as provided in ss. 53 and 54 of the Act.

Adultery

The petitioner had in para. 14 of her petition alleged that the respondent had on the night of 29 September 1998 at about 11.30pm committed adultery with a woman named "Carol". The respondent had in para. 4 of his answer denied this allegation. Section 58(1) of the Law Reform (Marriage and Divorce) Act 1976 states:

S. 58(1) On a petition for divorce in which adultery is alleged, or in an answer of a party to the marriage praying for divorce and alleged adultery, the party shall make the alleged adulterer or adultress a co-respondent, unless excused by the court on special grounds from doing so.

In this case the petitioner has not made the alleged adultress a co-respondent nor has obtained leave of this court waiving such requirements in s. 58(1) of the Act. In *Kong Ka Heng v. Ng Mooi Yee & Anor.* [2001] 2 CLJ 578 VT Singham JC (as he then was) said:

Burden of Proof

It is settled law that an allegation of adultery must be proved to the satisfaction of the Court beyond reasonable doubt. In Rayden on Divorce (12 ed) at p. 193 it is said, 'The burden of proof is throughout on the person alleging adultery there being a presumption of innocence.'

In *Bhanu Sekaramani v. Nagamma* [1991] 3 MLJ 34, it was held:

(2) Under paragraphs (a) and (b) of s. 54(1) of the Act, the commission of adultery by the Respondent or gross misbehaviour on the part of the Respondent is not per se sufficient ground for divorce simply because the Respondent may be able to show that the Petitioner has condoned the adultery or misbehaviour and the court must consider the conduct and circumstances of the case to see whether it is justifiable to grant a decree.

In *Wee Hock Guan v. Chia Chit Neo & Anor.* [1964] 3 MLJ 217, a Singapore case where Winslow J at p. 217 said:

a It is well established that an allegation of this nature must be proved to the satisfaction of the Court beyond reasonable doubt and that the onus of satisfying the court in this case rests upon the Petitioner. The evidence must go beyond establishing suspicious and opportunity to commit adultery and must be such as to satisfy the Court from the nature of things adultery must have been committed; where the evidence is entirely circumstantial the court will b not draw the inference of the guilt unless the facts relied on are not reasonably capable of other explanation (see Tolstoy on *Law and Practice of Divorce* 4th Ed. P. 29).

What are the evidence before this court:

c (a) Paragraph 14 of the petition alleged that the respondent had on the night of 29 September 1998 at about 11.30pm committed adultery with a woman named "Carol";

(b) Who is this "Carol". It can be any woman who happened to be called "Carol";
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(c) Petitioner has contrary to s. 58(1) of the Law Reform (Marriage & Divorce) Act 1976 and r. 11(1) of the Divorce & Matrimonial Proceeding Rules 1980 failed and/or omitted to make this "Carol" co-respondent nor has obtained any leave of this court not to make the alleged to make the
e alleged adultress co-respondent;

(d) Petitioner's testimony in court:

(i) Petitioner has not specifically identified who this "Carol" is;

f (ii) Petitioner alleged that this "Carol" was working at KL Plaza ie, opposite the respondent's place of work and yet she has not met her nor could specifically identify her;

(iii) That there is no direct evidence of the respondent committing the alleged act.

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I am of the opinion that the petitioner in fact has condoned the respondent's alleged adultery. What is condonation? On this subject reference is made to para. 1304 of *Halsbury's Laws of England*, vol. 13, 4th edn.:

1304. Nature and Import of Condonation

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Matrimonial offences are condoned when all such offences as are known to and believed in by the offended spouse are forgiven, so as to restore the marriage to the state in which it was before those offences were committed. The forgiveness which underlies condonation if not forgiveness in the true sense of that word; it does not imply that the injured party ceases to feel

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resentment at the offence or acts out of affection but means simply that the right of complaint has been legally released or remitted. Forgiveness by itself is not sufficient to constitute condonation. The crucial question is whether the conduct of the injured spouse amounted to re-instatement of the guilty spouse in his former position. The re-instatement need not amount to full reconciliation, but it may be relevant to consider not only the conduct of the injured spouse but also that of the offending spouse since if the latter does not consent to be forgiven, there can be no true reinstatement. Whether or not there has been condonation is a question of fact in every case to be determined on the balance of probabilities. At paragraph 1308 at page 631 of the same Vol. 13 of *Halbury's Law of England* has this to comment on "express or implied condonation."

Express or Implied Condonation

Condonation may be expressed or implied. Although certain acts are themselves sufficient to give rise to a presumption of condonation, any such presumption which arises from the continuance or resumption of marital intercourse by the spouses may be rebutted by evidence sufficient to negative the necessary intent. Where there has been a resumption of cohabitation, the burden will be upon the complainant to prove that there has been no condonation and that the cohabitation occurred with a view to effecting a reconciliation and did not follow a reconciliation already achieved. A husband who resumes sexual intercourse with his wife is presumed to condone her adultery if he has full knowledge of the offence.

The petitioner's testimony while under cross-examination that after the alleged "adultery" she continued to have marital relationship with the respondent and continued to have such relationship after they have moved into the condo in December 2000. Further, the learned counsel for the petitioner has impliedly admitted that there was condonation on that part of the petitioner and reference is made to p. 5 of the petitioner's written submission in reply to the respondent's written submission and I quote:

The Respondent submits a condonation on the part of the Petitioner and relies on the case of *Bhanu Sekaramani v. Nagamma* and says because of condonation, all her allegations would fail. We disagree because the Petitioner was trying her best to salvage the marriage. Though she had much pain, fear and emotional insecurity, she was giving the Respondent another chance to repent and change his behaviour to become a more loving, caring and responsible husband and father. She was also thinking about the children. However as fate would have it, a leopard never changes its spots, and the Respondent's behaviour became even more intolerably, thereby causing the breakdown of the marriage. The Petitioner should be commended for her efforts to save the marriage and not prejudiced by it now by this word 'condonation'.

It is clear that the petitioner has condoned the adultery if there is genuinely one. After hearing the oral evidence of both parties on the ground of adultery, I come to the conclusion that the petitioner in his matter has failed to discharge the onus.

Cruelty

In *Koh Teng Lam v. Elise Koh Chen Chee & Another* [1976] 1 MLJ 103 it was held:

> (1) The cases show that one basic or fundamental factor on which the whole concept of legal cruelty is injury to the Petitioner's health or apprehension of it. If there is no injury and no danger of it, there is no legal cruelty;
>
> (2) ...
>
> (3) The burden of proof is on the Petitioner who has to prove beyond reasonable doubt that the Respondent has since solemnization of the marriage treated him with cruelty or that she has been guilty of adultery;

In the present case the petitioner has failed to produce any medical report or police report pertaining to the alleged injury or injuries caused by the respondent and has therefore failed to discharge the onus.

Drunken Behaviour As Alleged By Petitioner

According to para. 19 of the petition, the petitioner alleged that the respondent used to drink alcohol during the night and returned home late at night in a drunken manner. Whereas according to para. 12 of the petitioner's affidavit affirmed on 4 September 2003, she affirmed that the respondent is a workaholic who works from morning till night almost every day of the week and even on Sundays. It is in evidence that the respondent is a social drinker of wine only and has a very low tolerance of hard drinks and because of his sinus problems he has been advised to refrain from drinking cold beer. It is therefore incredible that on one hand the petitioner alleges that the respondent returns home drunk late at night and on the other hand alleges that the respondent is a workaholic who works from morning to night. The petitioner has also failed to produce any evidence to substantiate these allegations. Again in this instance I think the petitioner has failed to discharge the onus of proof. In *Soo Lina v. Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)* [1994] 2 MLJ 134 (Abdul Kadir Sulaiman J as he then was) held:

> (2) Here the Respondent and Petitioner alleged different facts to establish the marriage has broken down irretrievably. The Respondent denied all the facts as alleged by the Petitioner. Therefore if the Petitioner wanted the court to make the decree for the dissolution of their marriage based on those facts

presented in her petition, it was for her to satisfy the court, at the trial that the circumstances made it just and reasonable to make the decree having regard to her alleged facts as provided ss. 53 and 54 of the Act.

It is observed that the respondent after leaving the condo in March 2001 encountered numerous difficulties in getting access to his children from the petitioner. After enduring his frustrations for more than two months the respondent was left with no choice but to file an application in this court for an interim access order to his children. On 2 July 2003, I gave an initial Interim Access Order to the respondent whereby the respondent was granted access to his children from 6pm every Saturday to 9.30pm on Sunday for two straight weeks. Subsequently on 17 July 2003 and 18 September 2003, I extended the Interim Access Order to 29 October 2003. The respondent and the petitioner have three children of the marriage namely:

(a) Aaron Phua will be twelve years old on 21 December 2003;

(b) Regina Phua will be nine years old on 24 October 2003;

(c) Evonne Phua will be six years old on 24 November 2003.

The petitioner has made several allegations against the respondent. The petitioner's version of the facts of the case are as follows:

(1) The petitioner is a full time home maker at all material times.

The above is not totally true as the petitioner is giving music classes to children in her neighbourhood;

(2) She has been a full time mother to her children at all material times.

The respondent is also a full time father. He is there for his children, takes them out, plays with them, swims with them, takes them out for dinner, goes school hunting with son and also goes out to earn a living to support the petitioner and his three children. It is quite a demanding role ie, being a father and sole breadwinner of the family.

(3) The children have been staying with the petitioner (and not with the respondent) since the respondent left the matrimonial home on 15 December 2000.

This statement as discussed below is totally misleading as:

(a) The respondent did not leave on his own accord. He was locked out – the locks to the apartment were changed by the respondent;

(b) He did not leave the matrimonial home on 15 December 2000.

The petitioner and the respondent's relationship underwent some strain and major efforts were made by the respondent to save the marriage but to no avail as parties are now before me. After the petitioner and respondent got married on 30 September 1990, they went to stay with the respondent's parents and three sisters at the respondent's parents home at No. 126, Jalan Terasek, Bangsar Baru, Kuala Lumpur until 1996, then later at No. 9, Lorong Chenderai, Taman Lucky, 59100 Kuala Lumpur until 15 December 2000. While staying with her in-laws ie, from 30 September 1990 until 15 December 2000, the petitioner enjoyed the benefits of an extended family. The benefits of an extended family are many. The children received love, affection, care and guidance from their grandparents and aunts. The children were staying with their parents and grandparents until 14 December 2000. It is only on 15 December that the petitioner, respondent and their three children moved to No. 18, Jalan 1/70C Off Mont Kiara, 50480 Kuala Lumpur, as it was the Petitioner's wish to do so. I think the purchase of No. 18, Jalan 1/70C Off Mont Kiara (a condominkium) on 29 August 2000 was a major effort by the respondent to save his marriage as the petitioner did not want to stay with her in-laws. The respondent wanted very much to keep his little family intact. The petitioner, the respondent and children moved into the condominium some time on 15 December 2000. The happiness was short lived because soon after renovation work was completed the petitioner drove the respondent out from his own home sometime in March 2001 by her cold treatment, tense situation, frequent quarrels, picking on the respondent, making him feel small. The petitioner not only made the respondent's life miserable and unpleasant but went on to change the locks of the apartment. In the first place it must be noted that the respondent did not leave his matrimonial home but was forced out and to make matter worse he was locked out when the locks to the apartment were changed. The respondent was locked out of his own home sometime in March 2000. The fact that the respondent was kicked out of his own matrimonial home by the petitioner should not be used to penalize the respondent of the company of his children. The respondent has been deprived of access to his own children for reasons only known to the petitioner. Why is the respondent treated in this manner? It was with much difficulty that the respondent managed to have access to his children even then with time limits imposed. Despite the interim access granted by this court on 2 July 2003 (allowing access to the respondent at 6pm on Saturdays to 9.30pm on Sundays) the respondent was and is still having problems with access. The respondent has exercised great patience in the issue of access as his children mean a great deal to him. In most cases where the father is the sole income earner and the mother is a homemaker, the mother usually enjoys a closer relationship with her children when compared to the father. This is normal as the father usually spends more time with his work or business whereas the mother shows love, affection and care for her children.

If one of the spouse in a divorce case lacks closeness to one's children, then this court should take cognisance of this matter and offer a solution to improve or nurture such a relationship. If this is not done during the child tender years then it would certainly be difficult to achieve it when the child/children gets older. In the present case the children either go to the morning or afternoon school session and are only back in the evening, and after their dinner, the children attend tuition classes. Despite the children's schedule, the respondent tried to call the children every night after their tuition classes to have a few words with them. However his calls were frequently deliberately left unanswered by the petitioner (see para. 5 of the respondent's affidavit affirmed on 22 May 2003). The respondent after obtaining an Interim Access Order have been spending time with his children and on one weekend his two daughters stayed with him overnight. It is noted that the respondent had stated that he was at the Subang Medical Centre at the time when all his three children were born, however he did not witness any of the births as all three children were delivered by caesarean section. As with most caesarean section cases the doctor did not encourage the respondent to witness the birth of his children. It must be noted that it was the petitioner's persistence that the respondent acquired the condo. Therefore the court have noticed the effort and the extent the respondent went through to renovate and purchase the furniture and fittings for the condo. Can the petitioner complain when it was her own volition that she initiated the moving out of No. 9, Lorong Chenderai, Taman Lucky, 59100 Kuala Lumpur. The petitioner surely cannot now complain that the respondent deprived his children to live at a luxurious place namely at No. 9, Lorong Chenderai, Taman Lucky, 59100 Kuala Lumpur.

Another point to remember is that at all material time, the respondent's parents never ceased their love and remained hospitable towards the respondent's family, welcoming them "to enjoy the luxury" as frequently as they were staying with the respondent's parents before. The moving out was the choice of the petitioner, and once the respondent is on his own (ie, not living in his parent's house) he therefore has to live within his means. The respondent offered the best for his family subject however to the expenses which the respondent has to be responsible for, which is stated in his affidavit of means. In the circumstances, one cannot disagree in view of the respondent's nett salary that he has given his best for his family.

The petitioner should not impose her own attitude on the minds of the children especially the eldest child who will be 12 years old in December 2003 and whatever is decided for this child for access is followed by the second and third child. If the older boy is not keen on meeting with the respondent then usually the second child will follow suit. This makes access very difficult for

the respondent as the older child is guided by the petitioner when it comes to matters of access and the respondent. The children's relationship with their father is unique. The same flesh and blood, their father is not just some other man. The children's own physical, mental and emotional makeup is partly determined by his genes. I am of the opinion that no one can say what harm will be caused if contact with their father is lost. The petitioner must remember the emotional damage to the children in later years can be immense. It is vital for a boy of 12 years and his two other siblings to spend as much time as is possible with their father to ensure that these children grow up to be balanced individuals. If hatred is taught to the children, then the children will not know other good emotions and will grow up to be problematic adults. If the minds of young children are frequently poisoned, children as innocent as they are will tend to believe what is being said to them or before them. I think the respondent is concerned with the children's welfare and their well being. He has been spending (before the separation) and still tries to spend quality time with his children, so that they get love from both parents. He knows his children's favourite food and things that they like to do. He is a friend to them. He has not been an absentee father to his children as it has been alleged over and over. He has attended their school functions and other outings that families do together. It is clear that by virtue of s. 88(4) of the Act, this court is not bound to place both or all of the children of a marriage in the custody of the same person but shall consider the welfare of each child independently. Aaron, is growing and will be a teenager soon and he needs the firm and experienced guidance of his father, the respondent throughout his growing years. I am of the view that by moving custody of the children from the petitioner to the respondent it will not cause any disruptions or discomfort in the lives of these children because the respondent understands and values the role that each parent has to play in the children's upbringing. After all the father lives only about 10-15 minutes away from the petitioner. I see that the respondent if he is granted custody, care and control of the children, is prepared to give the petitioner unlimited access to the children. As it is now, during his access he does invite the petitioner to join the children if she so wishes. He has always spoken politely to the petitioner. It was because the respondent wanted his children to grow up in peaceful environment that the did not break into the apartment when he was locked out by the petitioner although he owns 1/2 share of it. I think the respondent has made many sacrifices for the petitioner and his three children and suffers in silence. I think it is the petitioner who by her actions and undue influence on the children, who is causing the trauma within the family, not the respondent. If *status quo* is maintained, ie, the custody, care and control of the children is with the petitioner, the mother, the relationship between the respondent and the children will not improve. While away from the watchful eyes of the petitioner, the children warm up to their

father, the respondent. The children must not be deprived of this priceless emotion called love and care of their father. It is a very important ingredient for growing children. I do not view custody, care and control as ownership over the children. But instead in seeking custody, care and control, one can partake in daily decisions affecting the children and their well-being. Parents must have the children's best interest and welfare at heart. I can see that the respondent is keen on guiding the children pertaining to their education and general upbringing. The respondent does not see his role only as person who takes care of the financial needs of the child but someone who wants to play an active role in the upbringing of his children. He wants to be a role model to his children. The respondent comes from a family with good values, morals and upbringing and would like to pass on to his children what was taught to him by his parents, just as his grandparents passed on values and principles to his parents.

I think no parent has overnight experience in bringing up children. It is through trial and error that young parents learn and get better with experience. The respondent has also help raise his children. The petitioner did not single handedly raise all the three children. The petitioner obtained assistance from her mother-in-law, sisters-in-law, and the respondent himself. The petitioner cannot take all credit for herself. The children have only been separated from the respondent, ie, that they do not live under same roof since the last two years. The respondent, petitioner (since the day they got married) and the children (since they were born) have lived under the same roof until March 2001.

In the case of *Masam v. Salina Saropa & Anor.* [1974] 2 MLJ at p. 60, the High Court held that:

> Every case must plainly be determined upon the particular circumstances affecting the case, though, it is of course, true to say that as a matter of human sense an infant is better with his mother and needs a mother's care …

The father should not be cut off from maintaining links and fostering the father child relationship, with his children just because he was thrown out of his matrimonial home. In this regard the "conduct of the parties" should also be considered as it is relevant. In the case of *Chan Bee Yen v. Yap Chee Kong* [1989] 1 MLJ 370 at p. 373, Peh Swee Chin J (as he then was) held:

> The last factor I had to consider was the conduct of the parties bearing in mind the paramount consideration of the infant's welfare. While the wife complained of lack of any love or affection from the husband, both seemed to accuse each other of being hot tempered …

In the given case, the respondent was locked out of the matrimonial home by the respondent despite the fact that he was a good father, husband and provider. In the present case considering all the circumstances I am going to allow joint custody, care and control because the father can then be actively involved in the decision making process that involves the children's school, extra co-curriculum activities, health, games and other issues. Based on the facts of this case, a joint custody order is suitable for the following reasons:

(a) Both parents live close by to each other – a matter 10-15 minutes drive;

(b) There is no proven violence, harassment and cruelty by the husband on the wife instead it was the Respondent who was locked out;

(c) The facts of this case do not involve a situation where the wife was chased out from the matrimonial home by the husband;

(d) Both parties did not sign a document whereby both agreed to be divorced with immediate effect and that they go their separate ways.

In the case of *Kah Cheong Chan Kenneth v. Teoh Kheng Yau* [1994] 2 SLR at p. 879, joint custody was granted to the parties. In an article entitled *"Parents and Custody Orders – A New Approach"* by Associate Prof. Debbie Ong (1999) SJLS205, the learned author stated as follows:

> It is submitted that the court should use the factors of age and preservation of *status quo* in making orders of care and control and consider the issue of custody separately. It should grant joint custody in all cases with two exceptions. First where one parent is so unfit for parenting that the benefits of having his or her involvement in the children's life is far outweighed by the harm which his involvement may bring to the child. Second, where the relationship of parents is such that cooperation is impossible even after the avenues of mediation and counseling are exhausted and the lack of cooperation is harmful to the child. When a marriage breaks up, the child is in fear of losing his parents, his siblings and his familiar home. Joint custody protects the child from the reality and fear of losing a parent. A child who can understand that both his parents have custody of him and be assured that both his parents continue to be involved in his life may feel more secure. He will feel less abandoned even though family life has to undergo some changes.

For these reasons, it is hereby ordered that:

(a) The marriage is dissolved;

(b) Joint custody is to be exercised on Aaron Phua, Regina Phua and Evonne Phua by petitioner and the respondent whereby both have the right to have daily care, control and responsibility to make decision about such daily care, control over the three children. The children will live with the

petitioner on week days and on weekends the children will live with the respondent from 6pm on Friday to 8am on Monday. The respondent will send the children to school. School holidays, 1st half to respondent and 2nd half to petitioner. Chinese New Year and birthdays alternatively exercised by petitioner and respondent. This year is for the respondent;

(c) The respondent will personally pay RM1,800 maintenance for the petitioner so long she is not married. The company will stop paying her RM1,800 forthwith;

(d) The respondent is to maintain the children by providing them accommodation, clothing, food and education according to his station in life and by paying the cost thereof;

(e) Is dismissed;

(f) Is dismissed;

(g) The Almaspuri Condominium is divided 50:50 and the petitioner and the respondent shall each hold his/her 50% share on trust for the three children and each will pay his/her share of monthly instalment repayment;

(h) O.I.T.;

(i) (i) is dismissed;

(iv) is dismissed;

(v) is dismissed;

(vi) is dismissed;

(vii) is dismissed;

(viii) is dismissed;

(j) Is dismissed;

(k) Is dismissed;

(l) Each party bears its own costs.